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Taxation--Terminable Trust with Vested Remainder Includable in Gross Estate (Lober v. United States, 74 Sup. Ct. 98 (1953))

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crime is committed, and not when formal proceedings are commenced. Since the crime was committed while Toth was in the service, he was not entitled to the protection of the Fifth Amendment as applied to military personnel.

Quite apart from the merit of Article 3(a) as an expedient measure, and apart from trying, in a military court, a veteran who obtained his discharge through fraud, the constitutionality of the article is not well settled. The Court, in the instant case, must have thought that Article 3(a) is a valid and desirable extension of military jurisdiction, since the statute supplies a forum for the prosecution of alleged crimes which, under the old articles of war, would have been barred by the discharge of a person from military service.[19] However, even in relation to ex-servicemen, it is submitted that due process would require that they be given a preliminary hearing to determine whether they come within the scope of Article 3(a).[20]

TAXATION — TERMINABLE TRUST WITH VESTED REMAINDER INCLUDABLE IN GROSS ESTATE.—In an action for an estate tax refund, the executors contended that the Internal Revenue Commissioner erred, in that he included in decedent's gross estate the corpora of irrevocable trusts established by decedent. The beneficiaries had a vested interest in the trust principal, but the settlor, who was also the trustee, had the power to terminate the trusts prior to the expiration date. The Supreme Court, in affirming the Commissioner's determination, *held* that the decedent retained the power to "alter, amend or revoke" within the meaning of Section 811(d)(2) of the Internal Revenue Code, and hence the trust corpora were properly includable in the gross estate. *Lober v. United States,* 74 Sup. Ct. 98 (1953).

The present estate tax is derived from the Revenue Act of 1916,[1] which made only oblique reference to trusts, including in the gross estate any interest "... with respect to which ... [the decedent] has created a trust ... intended to take effect in possession or enjoy-

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Terry v. United States, 2 F. Supp. 962 (W.D. Wash. 1933); *Ex parte* Joly, 290 Fed. 858 (S.D.N.Y. 1922).

[19] See United States *ex rel.* Hirshberg v. Cooke, 336 U.S. 210 (1949).

[20] Senator McCarran, in March of 1950, introduced a bill to amend the Uniform Code of Military Justice which provided that a person arrested within the continental limits of the United States or its territories or possessions, shall be taken without delay to the nearest District Court for a removal hearing. Senate Introductory Bill, S. 3188. See Brief for Appellee, p. 14, Toth v. Talbott, No. 11964, D.C. Cir., March 25, 1954.

[1] 39 STAT. 756 (1916). Federal estate taxes had previously existed during periods of national emergency. See Knowlton v. Moore, 178 U.S. 41 (1900).

ment at or after his death. . . ." [2] The power of Congress to tax the transfer of estates is well established.[3] However, where an inter-vivos transfer is formally complete, a constitutional question is presented as to whether the tax imposed on the estate is illegal because measured by property not vested in the decedent at the time of his death.[4] The question in each case is whether the decedent retained such an interest in the property as to justify its inclusion within the decedent's estate consistent with constitutional standards. Insurance policies were held properly includable where the insured reserved the power to change the beneficiary, since prior to his death he retained a substantial power of control over the policies.[5] The statute was likewise construed as applicable to unilaterally revocable trusts,[6] but not to trusts where the settlor retained the power to modify only with the consent of the beneficiaries.[7]

In 1924, the prototype of the present Section 811(d)(2) of the Internal Revenue Code was enacted.[8] This section includes in the gross estate ". . . any interest . . . of which the decedent has . . . made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke. . . ." [9] The section was held applicable where the grantor retained the power to modify, although not to revoke, the trust.[10] In 1935, however, the Court limited the scope of the section in *White v. Poor*.[11] In that case the settlor-

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[2] Revenue Act of 1916, § 202, 39 STAT. 777 (1916).

[3] See New York Trust Co. v. Eisner, 256 U.S. 345 (1921); Knowlton v. Moore, *supra* note 1.

[4] See Nichols v. Coolidge, 274 U.S. 531 (1927). "An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall." *Id.* at 542.

[5] Chase National Bank v. United States, 278 U.S. 327 (1929).

[6] Reinecke v. Northern Trust Co., 278 U.S. 339 (1929).

[7] *Ibid.* In the *Reinecke* case two groups of trusts were in question. In one group, the settlor reserved to himself the power of revocation; in the other group, he could exercise such power only with the consent of the beneficiaries. In holding the latter trusts not includable in the estate, the Court said: ". . . [T]he trust . . . had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute." *Id.* at 346. Such a reserved power is no greater than the power given by law to the beneficiaries and settlor to revoke a trust by mutual consent. See RESTATEMENT, TRUSTS § 338(1) (1935).

[8] 43 STAT. 304 (1924). Internal Revenue Code Section 811(d)(2), in its present form, was enacted by 44 STAT. 71 (1926) (formerly numbered § 302(d) of the Internal Revenue Code). The last sentence, regarding procedure, was added by 49 STAT. 1744 (1936).

[9] INT. REV. CODE § 811(d)(2).

[10] Porter v. Comm'r of Internal Revenue, 288 U.S. 436 (1933). The tax was regarded as constitutional in such a situation because the grantor reserved such a power of disposal that only his death terminated his control and substantially completed the transfer. *Id.* at 444.

[11] 296 U.S. 98 (1935).

trustee retained the power of revocation, but only in conjunction with the other two trustees, one of whom was the beneficiary.[12] The very same day, in *Helvering v. Helmholz,*[13] the Court observed that if the section were to apply in such cases, it would be an unconstitutional tax on a transfer consummated prior to its enactment.

In consequence of the *White* decision,[14] the Congress, in 1936, enacted what is now Section 811(d)(1) of the Internal Revenue Code.[15] This section includes in the estate any interest in a trust over which the decedent retained the power to alter, amend, revoke or terminate ". . . alone or . . . in conjunction with any other person (without regard to when or from what source the decedent acquired such power). . . ."[16] Apparently mindful of the admonition against retroactive statutory application which was delivered in the *Helmholz* decision, the Congress made Section 811(d)(1) prospective, and Section 811(d)(2) remained in force as to trusts established prior to 1936.[17]

Any distinction between these statutes was apparently obliterated, however, in *Commissioner of Internal Revenue v. Estate of Holmes,*[18] which dealt with a terminable trust established prior to 1936. The Court, holding the trust includable in the gross estate, read the word "terminate" into Section 811(d)(2), and said that its inclusion in Section 811(d)(1) had only been a clarification of existing law.[19] In the *Holmes* case, where there was a series of contingent remainders, the Court held that the power to terminate such a trust was, in effect, a power of selecting who was to take.[20] This ruling was

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[12] The settlor was also a trustee, but the Court took the view that any power she possessed *qua* trustee was not within the scope of Section 811(d)(2). Where the settlor reserved such a power in the capacity of settlor, the trust was includable within the estate. Helvering v. City Bank Farmers Trust Co., 296 U.S. 85 (1935). In a later action brought under the same statute, this rather nebulous distinction was expressly rejected. See Welch v. Terhune, 126 F.2d 695 (1st Cir.), *cert. denied,* 317 U.S. 644 (1942).

[13] 296 U.S. 93, 98 (1935). The trial court in *White v. Poor* had taken a similar position. *See* 8 F. Supp. 995, 998 (D. Mass. 1934). The Supreme Court indicated that the *Helmholz* dicta were equally applicable in *White v. Poor, supra* note 11 at 102.

[14] *See* Comm'r of Internal Revenue v. Estate of Holmes, 326 U.S. 480, 487 (1946).

[15] 49 STAT. 1744 (1936).

[16] *Ibid.*

[17] *See* Comm'r of Internal Revenue v. Estate of Holmes, *supra* note 14 at 482.

[18] 326 U.S. 480 (1946).

[19] *Id.* at 488.

[20] The trusts named the sons of the settlor as beneficiaries, but if they should die before their termination then their issue would take. If there were no issue, however, the settlor's wife was to take, and if she were also dead, then her heirs would take. Thus, by a timely termination, the settlor might be able to select the beneficiaries, as the vesting of the trust corpora was contingent upon the beneficiary surviving termination.

followed where there was a contingent remainder,[21] but not when the remainder was already vested and a termination could only accelerate the power of enjoyment.[22]

In the principal case the tax was imposed pursuant to Section 811(d)(2) since the trust was established in 1929. The Court, in including the trust corpora within the gross estate, relied entirely upon the *Holmes* case, and refused to draw any distinction based upon the dissimilar factual situations. In the *Holmes* case, unlike the instant case, the settlor retained the power to accumulate the income indefinitely,[23] and, depending on the date of termination, the trust corpora might have gone to his sons, their issue, his wife or her heirs. In the present case, only the beneficiaries (or their heirs by operation of law) could take. It is respectfully suggested that such a distinction could and should have altered the result.

TORTS — ASSAULT BY FELLOW INMATE NOT WITHIN FEDERAL TORT CLAIMS ACT.—After being convicted as a user of narcotics, plaintiff chose treatment in a federal hospital in lieu of a prison term. While in the hospital he was stabbed by another inmate. In an action against the Government under the Federal Tort Claims Act,[1] plaintiff alleged a negligent omission to provide sufficient guards against such a contingency. The Government defended on the ground that the federal act expressly excepted from the purview of the Government's waiver of immunity provision, "any claim arising out of assault, or battery. . . ."[2] The Court, in rejecting the plaintiff's contention that the exception precludes recovery only when the assault or battery is inflicted by an employee of the United States Government, granted the defendant's motion for summary judgment, *holding* that the exception is not restricted to Government employees, and that *any* claim based on an injury resulting from an assault or battery is barred under the Act. *Panella v. United States,* Civil No. 69-16, S.D.N.Y., Dec. 9, 1953.

Through the Tort Claims Act the Federal Government has waived its immunity from suit for the torts of its employees, in situations where a private person would be liable pursuant to the *lex loci*

[21] See Comm'r of Internal Revenue v. Newbold's Estate, 158 F.2d 694 (2d Cir. 1946).
[22] See Hays' Estate v. Comm'r of Internal Revenue, 181 F.2d 169 (5th Cir. 1950).
[23] *See* Comm'r of Internal Revenue v. Estate of Holmes, 326 U.S. 480, 484 (1946).
[1] 28 U.S.C. §§ 1346(b), 2674 (Supp. 1950).
[2] 28 U.S.C. § 2680(h) (Supp. 1950).